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SERVICE DATE - OCTOBER 7, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-167 (Sub-No. 1164X)<sup>1</sup>

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—  
IN ERIE COUNTY, NY

STB Docket No. 42028

BUFFALO CRUSHED STONE, INC.

v.

R.J. CORMAN RAILROAD COMPANY/ALLENTOWN LINES, INC.  
AND R.J. CORMAN COMPANIES

Decided: September 28, 1998

In this decision, we are denying a petition to revoke in STB Docket No. AB-167 (Sub-No. 1164X) and dismissing a complaint in STB Docket No. 42028.

BACKGROUND

By notice of exemption in STB Docket No. AB-167 (Sub-No. 1164X), which was served and published in the Federal Register on July 23, 1996 (61 FR 38243), Consolidated Rail Corporation (Conrail) invoked the class exemption at 49 CFR 1152.50 to abandon 5.10 miles of railroad lines in Erie County, NY, consisting of the 4.5-mile Walden Running Track between mileposts 414.00 and 418.50 (herein, the Walden Line) and the .06-mile JD Industrial Track (JD Line) between mileposts 0.00 and 0.60. On August 19, 1996, pursuant to 49 U.S.C. 10904, R.J. Corman Railroad Company/Allentown Lines, Inc. (RJC�) filed an offer of financial assistance (OFA) to acquire the Walden Line and the JD Line from Conrail. In a decision served September 30, 1996, the Board issued a decision approving RJC�'s purchase of the lines for continued rail service.

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<sup>1</sup> These proceedings are not consolidated, but are factually related. A single decision is being issued for administrative convenience.

RJCN is a rail carrier that is controlled by Richard J. Corman, who also controls other short line railroads.<sup>2</sup> Mr. Corman also owns several noncarrier companies, including R.J. Corman Company/Material Sales (Material), which operates a rail material supply business.<sup>3</sup> Mr. Corman's corporate family is designated as the R.J. Corman Companies (Corman).

STB Docket No. AB-167 (Sub-No. 1164X)—Revocation of Notice of Exemption and Sale of Line to RJCN. On March 9, 1998, Buffalo Crushed Stone, Inc. (BCS) filed a petition seeking to vacate Conrail's notice of exemption claiming that the notice contains false or misleading information. BCS also seeks to revoke the transfer of the line to RJCN under the OFA procedures. The eastern end of the Walden Line runs through BCS's Wehrle Drive stone quarry at Bowmansville, NY. On April 10, 1998, Conrail and RJCN filed replies to BCS's petition. On April 29, 1998, BCS replied to Conrail's request to convert its notice of exemption into a petition for exemption and Conrail's request to grant the petition nunc pro tunc.<sup>4</sup>

BCS contends that Conrail's notice of exemption falsely certified that no local traffic had moved over the lines for at least two years. BCS submitted copies of waybills showing that Conrail moved 3 carloads of crushed stone from BCS's quarry over the Walden Line on October 25, 1994. These movements occurred during the 2-year period for which Conrail had certified that no local traffic had moved on the line. BCS asserts that Conrail's notice of exemption should, therefore, be declared void ab initio under 49 CFR 1152.50(d)(3). Furthermore, BCS maintains that the authorization for the sale of the lines to RJCN should be revoked because that transaction was predicated on Conrail's improperly filed notice of exemption. If authorization for the sale is not revoked on that basis, BCS asserts that the Board should still vacate the authorization granted RJCN to acquire the lines because, allegedly, RJCN has not provided service as required by section 10904(f)(4)(A).

BCS submitted a verified statement from Joseph S. Laraiso, BCS's Executive Vice President, to support its contention that BCS tried unsuccessfully to obtain rail service from RJCN. According to Mr. Laraiso, in October 1997, BCS received requests for 15 carloads of ballast from two customers located on Conrail's lines in Buffalo. Mr. Laraiso states that BCS asked both

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<sup>2</sup> Richard J. Corman—Continuance in Control Exemption—R. J. Corman Railroad Company/Allentown Lines, Inc., STB Finance Docket No. 32988 (STB served and published July 18, 1996 (61 FR 37540)).

<sup>3</sup> Material operates material yards in Gary, IN; Celina and Dover, OH; Northeast, Tyrone and Allentown, PA; and South Bethlehem, NY, and it has a sales and marketing office in Bridgeville, PA. The Allentown material yard is served by RJCN. The Celina, Dover and Tyrone yards are served by other railroads affiliated with RJCN.

<sup>4</sup> In a letter filed May 15, 1998, BCS supplemented the record and submitted a waybill for a shipment of 3 carloads of crushed stone that moved on November 15, 1994. Conrail replied by letter filed May 21, 1998.

Conrail and RJCN to provide cars to BCS and to quote rates for these movements which amounted to 3 miles. Mr. Lariaso indicates that Conrail quoted a price of \$325 per carload to deliver ballast from BCS's quarry to one customer and a price of \$450 per carload to deliver ballast to the other customer. Mr. Lariaso noted that Conrail's rate quote did not include RJCN's charges to use the Walden Line.

Mr. Lariaso states that RJCN submitted a "tariff" quoting a rate of \$950 per car to permit Conrail to operate over the Walden Line to move the shipments. In addition, Mr. Lariaso asserts that RJCN demanded that BCS prepay the charges in full before Conrail would be allowed to pick up the shipments. Mr. Lariaso claims that RJCN's quoted rate is unreasonably high. As a result, he states that BCS lost the sales because it was unable to quote a reasonable delivered price for the ballast. Mr. Lariaso also avers that the Walden Line could not have been used because portions of the track have been removed and grade crossings at Harris Hill Road and Sonwil Drive have been paved over. He notes that Conrail had indicated it could not provide cars for the requested movements because the Harris Hill Road grade crossing was blocked.

In its response, Conrail acknowledges that it handled six carloads on the Walden Line in 1994 and that it erred when it certified that there had been no local traffic moved within 2 years. It claims that the error was inadvertent, and that the certification was made in good faith. Conrail maintains, however, that the notice and subsequent sale of the lines to RJCN should not be vacated.<sup>5</sup>

Conrail asserts that it has been brought into BCS's dispute with RJCN only because of a technical deficiency in the notice of exemption. According to Conrail, BCS is not claiming that it would have opposed Conrail's abandonment, if it had realized that traffic moved over the lines during the 2-year period. Rather, Conrail claims that BCS is seeking to void the abandonment exemption as a means of removing RJCN as the operating rail carrier. In Conrail's view, voiding the abandonment would not address BCS's asserted need for rail service. If the abandonment were voided, Conrail states that it would reinstitute abandonment proceedings and likely obtain abandonment authorization either through a petition for exemption or an application.

Conrail submitted a verified statement from Mr. Charles Samul, Conrail's Manager of Line Sales, indicating that shortly after Conrail filed its notice of exemption, he was contacted by BCS's attorney who asked whether Conrail was willing to sell the line to BCS. According to Mr. Samul, Conrail would have considered any bona fide offer to purchase. Mr. Samul states that BCS was mainly concerned about being able to cross the track to access one of its quarries.

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<sup>5</sup> Subsequent filings by Conrail and BCS indicate that 12 carloads of ballast or crushed stone were moved from BCS's quarry in Bowmansville to Buffalo over the line in 1994. Waybills submitted into the record indicate that 6 carloads were moved on October 3, 1994; 2 carloads were moved on October 25, 1994; 1 carload was moved on October 25, 1994; and 3 carloads were moved on November 15, 1994.

Conrail further asserts that BCS took no part in the abandonment proceeding and the OFA process when Conrail negotiated the sale of the line to RJCN. Conrail claims that BCS was aware of the proposed abandonment and apparently was not concerned about the prospect that rail service would be discontinued or provided by another carrier. According to Conrail, permitting BCS a second opportunity to oppose the abandonment and sale of the line almost two years after it filed for abandonment would be grossly unfair to Conrail and RJCN, who assertedly relied on BCS's silence when RJCN acquired the line. Conrail further claims that permitting BCS to come forward at this time would undermine the Board's abandonment procedures by giving any party the opportunity to undo consummated abandonments and OFA transactions. Conrail further claims that BCS's delay in filing its petition is "egregious."

Conrail maintains that the Board should leave the abandonment exemption intact but fashion a remedy that would serve BCS's interests without undoing this transaction, which is now more than a year old. Conrail submitted a new petition for exemption and requests that, if the Board decides to void the notice of exemption, the petition be approved nunc pro tunc, thereby preserving the sale of the line to RJCN.

In its response, RJCN submitted a verified statement of its former president, M.W. Grubb. Mr. Grubb testifies that, before acquiring the lines from Conrail, his predecessor, Thomas R. Hammerstone, met with BCS to discuss RJCN's planned acquisition of the line. According to Mr. Grubb, RJCN made arrangements to lease BCS property for Material to use for a material yard. RJCN intended to serve Material and would also serve BCS and any other shipper which located on the line at competitive rates. According to Mr. Grubb, BCS was primarily interested in gaining access to its quarry on the eastern portion of the line. Mr. Grubb stated that RJCN indicated it would grant BCS an easement or other rights to enter and cross the rail line and would consider selling the property to BCS. Mr. Grubb noted that BCS did not seek to enter into a transportation contract with RJCN and did not indicate that it was concerned about rail service or rate matters. He indicates that BCS's primary concern at that time was the land use issues associated with the line.

Mr. Grubb states that Material began operating the material yard shortly after RJCN acquired the lines from Conrail. According to Mr. Grubb, Material received three carloads of traffic in January 1997 and one carload in March 1997. He states that, on March 11, 1997, Material was sent a letter from the Town of Lancaster stating that the material yard was operating in violation of "Town Approvals" and threatening fines and imprisonment for further violations. Contending that BCS was responsible for the permitting requirements, RJCN and Material requested that BCS resolve the Town's objections. According to Mr. Grubb, BCS attempted to correct the situation, but the permits that it ultimately obtained did not allow Material to successfully operate the material yard on the leased site. Mr. Grubb states that Material closed the facility and relocated its material sales yard to Erie, PA, in May 1997.

Mr. Grubb maintains that BCS has never shipped any traffic while RJCN owned the line. He acknowledges that RJCN provided BCS with a rate quote for a movement of ballast from the BCS Werhle Road quarry to two locations in the Buffalo area. He states that BCS did not tender

traffic in response to the rate quote and has not asked for any additional quotes or tendered any traffic since that time.

Mr. Grubb states that RJCN inspected the property in November of 1996 and 1997 and determined that the line was in safe condition for rail operations. According to Mr. Grubb, RJCN temporarily paved over the Harris Hill Road grade crossing, in response to local complaints. He states that, on November 17, 1997, the grade crossing was reopened to rail traffic, although none has been tendered. RJCN disputes BCS's claim that RJCN removed the Sonwil Drive grade crossing. He states that RJCN was not aware of the crossing's removal and will re-install the crossing when and if necessary to reach a rail customer on the relevant portion of the lines.

RJCN asserts that voiding Conrail's abandonment exemption would be unjustified and unfair and would undermine the class exemption process for abandonments. Even if the Board finds that remedial action is somehow necessary or desirable for Conrail's abandonment exemption, RJCN argues that there is no reason why that action should undo RJCN's long-since consummated purchase of the line under the OFA procedures.

RJCN further indicates that its lease of BCS property for a material yard is involved in a court action filed by BCS on October 7, 1997, against RJCN, Material, and Corman.<sup>6</sup> RJCN says that BCS's suit states that BCS agreed that it would: (1) not oppose Conrail's abandonment and Corman's purchase of the lines; (2) offer to lease a 7-acre parcel of land adjacent to the right-of-way for use as a material yard and; (3) obtain, at its expense, all government permits for use of the land, and that it would improve the parcel, at Corman's expense. BCS alleges that Corman agreed that, in exchange, it would: (1) sell BCS the portion of the track and right-of-way running across BCS property; (2) allow BCS undisturbed use and unlimited access across the right-of-way by easement until BCS acquires the property; (3) provide rail transportation to BCS; (4) lease the 7-acre parcel for use as a material yard; and (5) give BCS the right of first refusal of any interest in the entire trackage acquired from Conrail. BCS further alleges that Material closed the yard and abandoned the leased parcel and that RJCN has cut off rail access to BCS. BCS claims actual damages of \$100,000, anticipated damages of \$20 million and punitive damages of \$10 million.

On April 29, 1998, BCS replied to Conrail's request to convert its notice of exemption into a petition for exemption and to Conrail's request that we grant the petition nunc pro tunc. BCS asserts that Conrail has not presented sufficient evidence to show that the line was unprofitable or that the abandonment was in the public interest. BCS further claims that granting the exemption retroactively would also harm BCS. BCS asserts that Conrail did not offer it the opportunity to purchase the line, despite its alleged desire to do so. In support, BCS submitted a supplemental statement by Mr. Laraiso indicating that, when Conrail was considering RJCN's OFA, an official of

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<sup>6</sup> Buffalo Crushed Stone v. R.J. Corman Railroad Company, et al., No. I1997/7051 (N.Y. Sup. Ct.). Apparently, the suit was subsequently removed to federal district court, where it is pending.

Conrail had stated that Conrail would not consider an offer by BCS to acquire the line. BCS asserts that, as a result of Conrail's statements and RJC�'s assurances that it would provide service, BCS did not file an OFA or oppose Conrail's exemption request.

BCS disputes that it intentionally delayed discovering facts to support its petition to revoke the exemption. BCS asserts that it first learned that Conrail filed the notice of exemption on August 5, 1996, three days after the deadline for filing an OFA. Further, BCS states that it relied on statements by Conrail that the line would be sold to another carrier and that it also relied on RJC�'s assurance that it would provide rail service. As a result, BCS states that it did not have reason to investigate its records or seek to revoke the exemption. BCS asserts that it investigated the matter only after RJC�'s assurances were assertedly determined to be worthless and misleading.

BCS argues further that Conrail should not be granted a retroactive exemption, but should be required to submit sufficient information to justify granting the exemption and that BCS should be allowed the opportunity to contest the abandonment exemption. If the abandonment exemption were subsequently granted, BCS asserts that it should be given the opportunity to file an OFA to acquire the line.

STB Docket No. 42028—Complaint and Motion to Dismiss. On March 6, 1998, BCS also filed a complaint against RJC� and Corman<sup>7</sup> in STB Docket No. 42028, alleging that RJC� and Corman violated 49 U.S.C. 10702 and 10741(a) by refusing to serve BCS under rates and conditions equivalent to those offered to other similarly situated shippers, and by discriminating against BCS. The discrimination alleged is that RJC� and Corman demanded that BCS prepay all rates, which allegedly were so high that they precluded service, and, as an apparent prerequisite for BCS receiving rail service, forced BCS to sell a parcel of real estate to Corman for nominal consideration. BCS further charges that RJC� and Corman refused to provide service on the Walden Track on reasonable demand for the 2-year period required by 49 U.S.C. 10904(f)(4)(A). BCS alleges further that RJC� and Corman violated section 11101(a) by blocking access to the Walden Track. As relief, BCS requests that the Board require that RJC� grant BCS trackage rights over the Walden Track to enable BCS to obtain common carrier service from a carrier of its choice to serve its quarry at Bowmansville. BCS also seeks damages for lost sales resulting from RJC�'s alleged refusal to provide common carriers service.

RJC� filed an answer to the complaint on April 10, 1998. On April 17, 1998, RJC� filed a motion to dismiss the complaint. BCS replied to the motion to dismiss on May 7, 1998.<sup>8</sup>

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<sup>7</sup> BCS's complaint also names Mr. Corman and Corman's carrier and noncarrier affiliates as defendants.

<sup>8</sup> In a letter filed April 29, 1998, BCS and RJC� jointly submitted a proposed procedural schedule for the complaint proceeding.

On June 2, 1998, RJCN filed a supplement to its motion to dismiss and a surreply in both proceedings. RJCN also petitioned for leave to file its supplement and surreply, noting that Board procedures do not permit filing of replies to replies, 49 CFR 1104.13(c). On June 22, 1998, BCS filed a response objecting to RJCN's petition and surreply. We will accept RJCN's filing to the extent that it responds to new evidence submitted in BCS's May 7 filing regarding the Harris Hill Road crossing. We will not consider other arguments raised by RJCN.

In its motion to dismiss, RJCN asserts that BCS's complaint involves the proposed movement of crushed stone, a commodity which has been exempted from the Board's rate jurisdiction: 49 CFR 1039.11(a). RJCN contends that BCS must first seek to revoke the exemption before the Board could even consider its complaint. RJCN further asserts that BCS's complaint about rate reasonableness is defective because it does not allege that RJCN has market dominance over the transportation of crushed stone from BCS's quarry, as required by 49 U.S.C. 10707. RJCN further disagrees that it refused to provide service to BCS, claiming that it offered to provide rail service, but that BCS elected not to use that service because it believed rates were too high. RJCN also asserts that BCS's complaint improperly included as parties every RJCN affiliate, including its noncarrier individual owner. RJCN asserts that the complaint should be narrowed to actions taken by RJCN, and should not include RJCN's carrier and noncarrier affiliates who are far removed from the Walden line.

Responding to RJCN's motion to dismiss, BCS states that even though the commodities it proposed to ship are exempt under 49 CFR 1039.11(a), RJCN still has a common carrier obligation to provide service and that RJCN has failed to provide service in violation of 49 U.S.C. 10904(f)(4)(A) and 49 U.S.C. 11101(a). BCS presented an additional statement from Mr. Laraiso, who submitted photographs showing that the grade crossings at Harris Hill Road and Sonwil Drive have not been repaired as claimed by RJCN. Mr. Laraiso indicates that RJCN does not have locomotives or equipment near the line and argues that RJCN could not provide service even if requested. He states further that RJCN has made no effort to generate traffic or solicit new business and has not established any facilities to make rail service available, or to provide rail service to any other shipper. Mr. Laraiso suggests that RJCN may be holding the line for salvage. These actions allegedly prevent BCS from using rail service. He claims that BCS is losing business opportunities, and notes that BCS has made preliminary market studies showing potential customers that can receive products by rail. BCS states that the line is not available if BCS needed to move mining machinery or other nonexempt commodities on the line. BCS further asserts that it is not challenging the reasonableness of RJCN's rates per se, but rather, is asserting that RJCN is using unreasonable rate demands as a means of avoiding its obligation to move traffic on the Walden Track. These facts, which BCS claims must be presumed to be true, support the complaint. BCS further states that RJCN should submit evidence to clarify the identities and involvements of its affiliates with the Walden Line.

RJCN's surreply addresses the status and condition of the Harris Hill Road grade crossing, which assertedly is on the portion of the Walden Line that would be used to operate trains to and from BCS's Wehrle Drive quarry. A verified statement from William H. Wilson, RJCN

Roadmaster, reaffirms that RJC� repaired the crossing on November 17, 1997. He indicates, however, that a recent inspection confirms that the crossing was covered again with a light covering of asphalt. He states that the repaving of the crossing occurred after November 17, 1997, and was not performed with RJC�'s knowledge or direction. He indicates further that RJC� made inquiries from local and county authorities but was unable to find out who repaved the crossing. Mr. Wilson states that, if a request for rail service is made, RJC� crews can reopen the crossing in one day.

#### DISCUSSION AND CONCLUSIONS

Petition to Vacate and Revoke. When it is shown that a carrier falsely certifies that no traffic moved on a line, the notice of exemption is normally declared void ab initio under 49 CFR 1150.50(d)(2) and the notice is vacated. The St. Louis Southwestern Railway Company—Abandonment Exemption—In Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass and Jackson Counties, MO, Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994); Southrail Corporation—Abandonment Exemption—Between Laurel and Bay Springs, MS, in Jones and Jasper Counties, MS, Docket No. AB-301 (Sub-No. 2X) (ICC served Jan. 27, 1989). None of those cases, however, involved a subsequent sale pursuant to an offer of financial assistance. Were we to revoke the exemption as requested by BCS, our action would not only adversely affect Conrail, but it would also negate a purchase by an innocent third party, RJC�, which invoked section 10904 in the good faith belief that, if it complied with the statutory standards and procedures, it would acquire the line. To hold otherwise would not only work unjustifiable injury to bona fide purchasers such as RJC�, but also would undermine section 10904. Purchasers acquiring lines under that provision would have to worry that their rights to the lines they acquire might be abrogated months and perhaps years later because of some defect in the underlying abandonment.

Our practice of revoking abandonments authorized pursuant to the class exemption is predicated on the need to maintain the integrity of the applicable regulations. But that purpose is not served when upholding the class exemption can only be achieved at the expense of derogating section 10904 of the statute.<sup>9</sup>

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<sup>9</sup> BCS also claims that RJC� refused to provide common carrier service over the Walden Track in violation of 49 U.S.C. 10904(f)(4)(A). The facts of record do not support this allegation. The record indicates that RJC� acquired the Walden Line to provide rail service to its affiliate, Material, at its material yard which was to locate on the line. RJC� was also willing to handle any additional traffic generated by BCS or other potential customers. Material began operating the material sales yard and began receiving rail traffic in January 1997. Because of a local permitting problem, Material subsequently closed the facility and relocated its material sales yard in March 1997. Since then, the line has not been used for rail service. Had Material remained on the line, it appears that the line would still be actively operated. But there is nothing in the record to indicate that BCS would have used the line. In any event, the record indicates that RJC� was and is ready

(continued...)

In addition, the party seeking revocation, BCS, was also the party tendering the shipments to Conrail during the two-year period prior to the filing of the notice of exemption. BCS thus had actual knowledge of the fact that shipments had moved during that period, but did not challenge the notice in a timely fashion. While we need not decide whether that fact, standing alone, would suffice to deny the petition to revoke the exemption, it does support our decision to deny the petition.

Because we are denying the petition to revoke, we need not decide Conrail's petition for exemption to abandon the line.

Motion to Dismiss Complaint. In considering a motion to dismiss, we construe the factual allegations in a light most favorable to the complainant. See Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company, STB Docket No. 42012 (STB served Jan. 26, 1998). Also, under 49 U.S.C. 11701, we may dismiss a complaint when we determine that it "does not state reasonable grounds for investigation and action." In our view, BCS's complaint fails to state reasonable grounds for Board action, even if the alleged facts are presumed to be true and are considered in the light most favorable to BCS.

BCS claims that it is a shipper seeking rail service, but the facts of record indicate differently. As we noted, the record shows that BCS has not shipped any traffic on the line in more than 3 years. Its last shipment was moved on November 15, 1994. The only traffic that RJC� handled on the line were the four shipments moved for Material in January and March, 1997. The record shows that BCS asked for a rate quote from RJC� and received a rate quote "tariff" from RJC�, but there is nothing in the record indicating that BCS tendered traffic to move on the line at that time. Nor is there evidence that BCS discussed with RJC� using the line. We cannot find that one rate quote provided to a previously inactive shipper amounts to a refusal to provide service.

Even though the line is currently inactive, RJC� continues to have a common carrier obligation to provide rail service upon request. That obligation continues until appropriate abandonment authority is granted. The Atchison, Topeka, and Santa Fe Railway Company—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991). The line at issue is physically separate from other RJC� lines and the lines of other affiliated carriers. Given that the line is inactive, RJC� need not keep equipment or employees located near the line. However, RJC� acknowledges that it continues to have a common carrier obligation to provide service and indicates that it will provide service if requested.

There is no indication in the record that the line is physically unable to carry traffic. Rather, RJC�'s evidence shows that the line has been inspected and has been determined to be safe to operate. BCS has shown that the grade crossing at Harris Hill Road, which is on the portion of the

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<sup>9</sup>(...continued)

and able to provide rail service to BCS and other shippers on the Walden Line, if service were or is requested.

line serving BCS's quarry, is currently paved over. However it does not appear that RJC� is responsible for the current blockage. In any event, the grade crossings can be restored quickly if rail service is resumed on the line. Moreover, BCS does not question the quality of the remainder of the line.

We also agree with RJC� that, before we could consider BCS's complaint alleging that the rate quoted by RJC� was unreasonable, BCS must first petition to revoke the exemption in 49 CFR 1039.11, which applies to rail shipments of crushed stone. See Consolidated Rail Corp.—Declaratory Order—Exemption, 1 I.C.C.2d 895, 900 (1986). Even though BCS states that it is not seeking a rate prescription or challenging the reasonableness of the quoted rate, we first have to reassert jurisdiction over the rate before we can address BCS's objections to the quoted rate. Thus, BCS must show that revocation of the exemption is warranted under 49 U.S.C. 10502(d).

We note that BCS has also alleged in its complaint that RJC� has attempted to require BCS to purchase a parcel of land adjacent to the track as a prerequisite for receiving rail service. This issue is being litigated in the court suit brought by BCS against RJC�, Material and Corman. We see no need to address this matter here. Nor do we need to address the question of whether Corman's affiliates are proper parties here.

Finally, in its requested relief, BCS has asked that we require RJC� to grant it trackage rights so that BCS could either obtain common carrier service from another carrier or operate common carrier service itself. Ordinarily, we have no jurisdiction to compel a rail carrier to acquire or grant trackage rights to another carrier. Toledo, P. & W. R. Co., Control 295 I.C.C. 523, 541 (1957). While we can impose trackage rights as a condition to a rail consolidation under 49 U.S.C. 11323 or in a terminal area under 49 U.S.C. 11103, these circumstances are not present here. We find that we lack jurisdiction to grant BCS trackage rights relief here.

Having considered the record, we find that the complaint does not state reasonable grounds for Board action. Therefore, we will grant RJC�'s motion to dismiss the complaint.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. BCS's petition to revoke the notice of exemption is denied.
2. RJC�'s motion to dismiss the complaint in STB Docket No. 42028 is granted.

STB Docket No. AB-167 (Sub-No. 1164X), et al.

3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary